COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

FIBER TECHNOLOGIES NETWORKS, L.L.C., Complainant	)	
v.	)	D.T.E. 01-70
SHREWSBURY'S ELECTRIC LIGHT PLANT, Respondent	)	

RESPONDENT SHREWSBURY'S ELECTRIC LIGHT PLANT'S
OPPOSITION TO PETITION TO INTERVENE OF
METROMEDIA FIBER NETWORK SERVICES, INC.

Pursuant to the provisions of 220 C.M.R. 1.03(1)(d), the respondent Shrewsbury's Electric Light Plant ("SELP") hereby opposes Metromedia Fiber Network Services, Inc.'s ("MFN") petition to intervene in the above-captioned proceeding. In support of its opposition, SELP sets forth the following arguments. This proceeding involves a complaint filed by Fiber Technologies Networks, L.L.C. ("Fibertech") against SELP based on SELP's refusal to permit Fibertech to attach dark fiber optic cable to poles in the Town of Shrewsbury owned by SELP, initiated pursuant to the provisions of G.L. c. 166, § 25A and the Department of Telecommunications and Energy's ("DTE" or "Department") regulations promulgated thereunder, 220 C.M.R. 45.00. On October 16, 2001, MFN filed a petition to intervene in this proceeding.

In support of its petition, MFN states that its "primary business includes leasing fiber optic cable…." Petition to Intervene, ¶ 3. MFN alleges that "[a]s a precursor to offering its services, MFN has acquired authorization from numerous municipalities in Massachusetts, pursuant to G.L. c. 166, §

22" to install fiber in the public way. Id., ¶ 4. MFN also alleges that it has entered into conduit attachment, and interconnection agreements with Verizon. Id., ¶s 6-8.

In its petition, MFN states that while it does not have any pending dispute with SELP concerning the attachment of its fiber to utility poles owned by SELP, "it may be specifically and substantially affected by the Department's findings and rulings in this proceeding regarding certain telecommunications services providers' right to obtain authorization from municipalities to access the public rights of way and… to attach facilities to utility poles or conduits." Id., ¶ 11. MFN alleges that its existing installed facilities, as well as plans for future facilities, could be adversely impacted by the Department's ruling in this matter, and that its interests are not adequately represented by other parties in this proceeding. Id., ¶s 12-15. MFN seeks the right to file documentary evidence, direct testimony and submit briefs. Id., ¶ 16. In the alternative, MFN seeks limited participant status. Id., ¶ 17. At the procedural conference held in this matter, MFN indicated, as a preview of its participation in this matter, that it wishes to offer testimony on such matters as the amount of dark fiber currently in Massachusetts, and the role such fiber plays in providing "telecommunications services"[1]; however, MFN's petition to intervene does not describe the nature of evidence that MFN will present if it is allowed to intervene. This failure alone is grounds for denial of MFN's petition under the Department's regulations. 220 C.M.R. 1.03(1)(b).

The Department's standard of review for intervention in any matter is governed by G.L. c. 30A, § 10, which provides that it "may allow any person showing that he may be substantially and specifically affected by the proceeding to intervene as a party…." G.L. c. 30A, § 10(4). Under 220 C.M.R.

1.03(1)(b), a petition to intervene must describe the manner in which the petitioner is substantially and specifically affected, and must show, among other factors, the nature of the evidence the petitioner will present if the petition is granted. E.g., Boston Edison Co. and Boston Mergeco Co., Inc., D.P.U. 97-83, at 15 (1997). Under G.L. c. 30A, § 10, the Supreme Judicial Court has held that the Department has broad discretion to grant or deny participation in its proceedings. Id. In Save the Bay, Inc. v. Dept. of Public Utils., 366 Mass. 667 (1975), the Court expressed concern that "the multiplicity of parties and the increased participation by persons whose rights are at best obscure will, in the absence of exact requirements as to standing, seriously erode the efficacy of the administrative process." 366 Mass. at 672. This concern is particularly acute where, as here, the Department must to issue a decision within 180 days after a complaint is filed. 220 C.M.R. 45.08. In ruling on a petition to intervene, the Department may consider factors such as the interests of the petitioner, whether the petitioner's interests are unique and cannot be raised by any other party, the scope of the proceeding, the potential effect of the petitioner's intervention on the proceeding, and the nature of the petitioner's evidence, including whether such evidence will help elucidate the issues of the proceeding. Boston Edison Company, D.T.E. 98-118, 99-119/126, at 9 (1999); see also, 220 C.M.R. 1.03(1)(b).

In its petition, MFN admits it has no dispute with SELP. This is yet another reason to deny MFN's petition to intervene. MFN does not state that it has ever requested, or been denied, a pole attachment by SELP, or by any municipal light plant or investor-owned utility. In fact, MFN represents that it has successfully obtained a conduit attachment agreement with Verizon. Petition to Intervene, ¶ 7. It also states that it has received many grants of location in the public ways for its fiber from

[1] As stated in its Response to Fibertech's Complaint, SELP maintains, and will maintain, that it is impossible as a matter of law for fiber that is dark or unlit to provide any type of service whatsoever, let alone transmit intelligence by

municipalities pursuant to G.L. c. 166, § 22.[2] Id., ¶ 4. MFN's concern appears to be that somehow a Department ruling on this dispute between SELP and Fibertech will impact whether it can continue to pursue grants of location in public ways from cities and towns pursuant to G.L. c. 166, § 22, and that somehow its existing grants of location and its agreement with Verizon could be jeopardized by a ruling in this case. Id., ¶s 11-14. Nothing could be further from the truth. In its Petition, MFN never even states how the Department's ruling in this dispute would specifically have an adverse impact on it. Again, this is just another reason to deny MFN's Petition to Intervene. First, the Department has no role in the enforcement or implementation of the provisions of G.L. c. 166, § 22. This statute pertains solely to the powers of cities and towns to permit construction of lines in, over and under their public ways. Appeals for denials under G.L. c. 166, § 22 are to a court via certiorari, not the DTE (except in the case of electric transmission lines). G.L. c. 249, § 4; Boston Edison Co. v. Board of Selectmen of Concord, 355 Mass. 79, 87 (1968). SELP has alleged that Fibertech cannot be a "licensee" because it is not a company incorporated for the transmission of intelligence by electricity, telephone or otherwise, and therefore is not a company that could petition a city or town for a grant of location. However, this does not mean that the Department can make rulings of law that would bind cities and towns regarding the specific provisions of G.L. c. 166, § 22.

Additionally, it is a legal impossibility for any decision by the Department in this matter to 1) to somehow effectuate the revocation of existing grants of location to MFN under G.L. c. 166, § 22 (see e.g., New England Power Co. v. Board of Selectmen of Amesbury, 389 Mass. 69 (1983) (authority of

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electricity or cable television, which is required to meet the definition of "attachment" under G.L. c. 164, § 25A.

[2] It should be noted that a grant of location under G.L. c. 166, § 22 by a city or town is always, and has always been discretionary. A city or town is not compelled to grant locations to anyone regardless of whether they are in fact found to be a company incorporated for the transmission of intelligence by electricity, telephone or cable television signals.

selectmen to grant street crossings for power lines does not include authority to revoke)) or 2) adversely impact MFN's rights or excuse anyone's performance under any binding conduit or pole attachment agreement with Verizon or any other party for that matter.[3]

Further, MFN's interests appear to be identical to Fibertech's in this matter, as set forth in its Complaint: that the Department find that dark fiber is an "attachment" and that dark fiber companies can utilize the provisions of G.L. c. 166, § 25A and 220 C.M.R. 45.00 et seq. to access utility poles and conduit. Accordingly, MFN's interests are adequately represented by Fibertech in this proceeding.[4]

The scope of this proceeding, by virtue of the authority pursuant to which it is conducted, is necessarily limited to the complaint of Fibertech against SELP for SELP's refusal to allow it to attach to its poles on the basis that Fibertech is not a licensee and its fiber is not an attachment under G.L. c. 166, § 25A and 220 C.M.R. 45.02. MFN has no information particular to Fibertech's dispute with SELP that will elucidate issues of this proceeding, nor does MFN claim to have such information. Indeed, MFN's role will be that of cheerleader for the dark fiber industry, which cannot assist the Department with the questions of law before it: whether Fibertech's dark fiber is an "attachment" and whether Fibertech is a "licensee" under the definitions that currently exist at G.L. c. 166, § 25A and 220 C.M.R. 45.02. MFN's intent to provide direct testimony in this proceeding on matters such as the value (presumably, "societal" in nature) of dark fiber and the role the dark fiber industry plays in

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[3] MFN does not allege that Verizon signed a conduit agreement on the basis of a request made pursuant to 220 C.M.R. 45.00 or that the agreement is governed by the DTE's pole attachment regulations. However, the manner in which Verizon handles such requests has no bearing on this dispute.

[4] The fact that MFN may in fact be a competitor of Fibertech (or even SELP) is irrelevant to the question of standing to intervene. See Cablevision Systems Corp. v. Dept. of Telecommunications & Energy, 428 Mass. 436, 437-38 (1998).

"telecommunications" services simply underscores how its participation will prejudice and overburden SELP, and confuse the issues in this proceeding. It is apparent that MFN will seek to introduce issues that are irrelevant to the instant dispute, wants to pursue evidentiary hearings on matters that are undoubtedly pure public policy and plans to submit testimony on irrelevant facts that have absolutely no bearing on the issue of whether, for example, under the law, Fibertech is a company incorporated for the transmission of intelligence by electricity or telephone or cable television signals or whether its facilities are an attachment under G.L. c. 164, § 25A.[5] This is not a proceeding wherein the issues of MFN as a business or MFN's facilities as attachments are being adjudicated.[6] Allowing an intervenor such as MFN to interpose broad public policy issues, through discovery and testimony on irrelevant matters, in a complaint proceeding under 220 C.M.R. 45.00, is inappropriate and prejudicial. See e.g., New England Telephone and Telegraph Co. d/b/a NYNEX, D.P.U. 96-73/74, 96-80/81/83, 96-94 (Phase 2-B) (Phase 4-B), at 9 (1997). Otherwise, this proceeding will evolve into a generic forum, placing SELP at a severe disadvantage with regard to its limited public resources, and be highly inefficient for the Department's quick adjudication of the specific dispute currently before it. If the Department allows an intervention on such issues then the Department should open a generic proceeding where all potential applicants for attachments, utilities that own poles, and cities and towns should be able to participate. However, MFN's intervention is inappropriate in a specific and particular dispute held under the Department's regulations, 220 C.M.R. 45.00.

[5] The fact that MFN or any other dark fiber company has invested substantial amounts of money in Massachusetts is entirely irrelevant to the question of whether a dark fiber company can utilize the provisions of 220 C.M.R. 45.00 to obtain access to utility poles. Petition to Intervene, ¶ 6.

[6] SELP doubts that MFN would want all of its pole attachments subject to adjudication in this case by the Department.

While MFN has failed to articulate with specificity in its petition the nature of the evidence it would intend to introduce, which failure alone would doom its petition under G.L. c. 30A, § 10(4), if permitted to interevene as a full party in this matter, issues that might be raised by MFN regarding the public policy merits of allowing dark fiber to proliferate on poles throughout the Commonwealth, or the management of public ways under G.L. c. 166, § 22 by cities and towns, are beyond the scope of these proceedings and/or the Department's jurisdiction. MFN cannot demonstrate specific injury with regard to these proceedings. See e.g., Attorney General v. Dept. of Pub. Utils, 390 Mass. 208, 216-17, n. 7 (1983)

Accordingly, because MFN has failed to demonstrate that it is substantially and specifically affected by these proceedings, and that its interests cannot be adequately represented by Fibertech, the Department should deny its petition to intervene.

Respectfully submitted,

SHREWSBURY'S ELECTRIC
LIGHT PLANT

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Dated: October 22, 2001